

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,       )  
                                          )  
                          Plaintiff       )  
                                          )  
                  -VS-                       ) Criminal No. 05-10074-PBS  
                                          ) Pages 1 - 73  
CHARLES CARRINGTON,                )  
                                          )  
                          Defendant       )

COMPETENCY HEARING

BEFORE THE HONORABLE PATTI B. SARIS  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

WILLIAM H. CONNOLLY, ESQ., Assistant United States  
Attorney, Office of the United States Attorney, 1 Courthouse  
Way, Boston, Massachusetts, 02210, for the Plaintiff.

MARK W. SHEA, ESQ., Shea, Laroque & Wood, LLP,  
47 Third Street, Suite 201, Cambridge, Massachusetts,  
02141-1265, for the Defendant.

United States District Court  
1 Courthouse Way, Courtroom 19  
Boston, Massachusetts  
March 22, 2007, 3:20 p.m.

LEE A. MARZILLI  
OFFICIAL COURT REPORTER  
United States District Court  
1 Courthouse Way, Room 3205  
Boston, MA 02210  
(617)345-6787

## I N D E X

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REDIRECT

RECROSS

Robert Denney

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P R O C E E D I N G S

THE CLERK: The case of the United States V. Charles Carrington, Criminal Action No. 05-10074, will now be heard before this Court. Will counsel please identify themselves for the record.

MR. CONNOLLY: Good afternoon, your Honor. William Connolly for the government.

MR. SHEA: Mark Shea for Mr. Carrington. Good afternoon.

THE COURT: Now, let's make sure I have everything because a bunch of things have come in. I've been in trial all day today and I've had hearings all afternoon, so I can't promise I've read everything. Let me tell you what I've read and I've not read so you have some sense of things. I read the government's Medical Center for Prisoner Report. I read Mr. Shea's expert's Confidential Psychological Report dated September -- well, a while ago, actually, that you resubmitted. Is that right?

MR. SHEA: I believe so, yes.

THE COURT: Okay. I received a memo today which I have not read other than skimmed. I have a general sense of it, but I don't think it's worth taking the time right now to argue, which is the Memorandum of Law in Support of Defendant's Motion to Strike Competency Determination. That's now been file. We're not going to argue it. I have

1 three witnesses here.

2 MR. SHEA: I was just going to say I'll rest on the  
3 papers.

4 THE COURT: Okay. And then, Mr. Connolly, you may  
5 want to respond to it, but we're not going to take that  
6 today.

7 I received another thing, which is U.S. Medical  
8 Center for Federal Prisoners, Springfield, Missouri. Is that  
9 another evaluation?

10 MR. CONNOLLY: It is, your Honor. The original  
11 report was prepared by Dr. Preston who did a competency  
12 evaluation. Contained within her report is the tests and the  
13 findings of neuropsychologists who did neuropsychological, if  
14 I'm saying right, evaluations.

15 THE COURT: That's Dr. Robert Denney?

16 MR. CONNOLLY: Yes, who will be the first witness.  
17 When I spoke to those two witnesses today --

18 THE COURT: Didn't that just come in today?

19 MR. CONNOLLY: Yes.

20 THE COURT: One of them I got several days ago and  
21 I read, but one of them I think I, at least, just received  
22 today.

23 MR. CONNOLLY: Yes, and that's because when I met  
24 with the witnesses today, I found out from Dr. Denney that in  
25 fact he had a separate report. It had never been forwarded.

1 There's not a competency opinion in there, but he wanted to  
2 make sure we all had a copy of his report. I think it's  
3 contained within --

4 THE COURT: Had you seen it before? Are you  
5 prepared to cross on it today?

6 MR. SHEA: No. I mean, I hadn't seen it before. I  
7 can do my best.

8 THE COURT: See what you can. If worse comes to  
9 worst, we'll bring him back.

10 MR. CONNOLLY: If we have to do that, that's fine,  
11 your Honor. I think, again, the vast majority of -- his  
12 findings are contained within Dr. Preston's report.

13 THE COURT: Sure. Now, let me ask you this,  
14 Mr. Shea: Do you have an expert here today?

15 MR. SHEA: Yes.

16 THE COURT: And is he the guy who prepared the  
17 report, now a year ago?

18 MR. SHEA: Yes.

19 THE COURT: I should remember him, but -- there you  
20 are, okay.

21 MR. SHEA: I'll remember that in an ID case.

22 THE COURT: That's right, that's right, I might not  
23 be your best. Do you have another report, or is it just the  
24 old one?

25 MR. SHEA: It's just the old one, though he did

1 just meet with Mr. Carrington between 2:00 and 3:00 o'clock  
2 today.

3 THE COURT: So there may be something supplemental?

4 MR. SHEA: There may be.

5 THE COURT: Where are these folks coming in from?

6 MR. CONNOLLY: Missouri.

7 THE COURT: Okay, so how long do you think you're  
8 going to need?

9 MR. CONNOLLY: We may, based on both my own  
10 analysis and the doctor's analysis of what typically occurs  
11 in their contested competency hearings, we all agree that it  
12 would be surprising if both of them complete their direct and  
13 their cross today because --

14 THE COURT: Let's get going because I didn't know  
15 this, so, I mean, I didn't have tomorrow for you tomorrow.  
16 I'm on trial.

17 MR. CONNOLLY: I understand. We're fine with them  
18 coming back. Just so that your Honor knows, when I did find  
19 out there were two witnesses, I notified the Court. They're  
20 fine coming back, your Honor. If they have to come back,  
21 they'll come back. They understand it's part of the job.

22 THE COURT: And I just think, as a practical  
23 matter, it's highly unlikely that your expert will get on  
24 today. If you want him to sit through it, I'm happy to pay  
25 for it. If you want him to leave, I'm happy to do that.

1 MR. SHEA: I'd ask, if it's all right, if he could  
2 sit through it because he's helpful for just seeing things  
3 that I don't pick up on that they're talking about.

4 THE COURT: Sure.

5 MR. CONNOLLY: And of course I have no objection as  
6 long as it works both ways, our experts can stay for  
7 Dr. Mart, if in fact they're here.

8 MR. SHEA: Yes, that's fine.

9 THE COURT: Typically the sequestration rule  
10 doesn't apply to experts, though there are exceptions. Let's  
11 go.

12 MR. CONNOLLY: And I understand the documents that  
13 you have. Could I offer them as actual exhibits? I have  
14 copies here.

15 THE COURT: Yes, let's mark them. Do you want to  
16 mark yours too while we're at it?

17 MR. SHEA: Sure.

18 THE COURT: Okay. Do you have a copy?

19 MR. CONNOLLY: I have an extra copy.

20 MR. SHEA: You do?

21 MR. CONNOLLY: Yes.

22 THE COURT: Let's just mark them and get the three  
23 reports in.

24 MR. CONNOLLY: That's Mart's. That will be No. 5.

25 THE CLERK: All right. That's your 1?

1 MR. CONNOLLY: It's the CV of the first witness,  
2 his report; CV of the second witness, his report. And, your  
3 Honor, just so the Court is aware, I've offered the two CVs  
4 for the witnesses so I don't have to completely go through  
5 all their qualifications.

6 (Plaintiff Exhibits 1-4 received in evidence.)

7 (Defendant Exhibit 5 received in evidence.)

8 MR. CONNOLLY: The first witness is Robert Denney.

9 ROBERT L. DENNEY

10 having been first duly sworn, was examined and testified as  
11 follows:

12 THE CLERK: Would you please state your name and  
13 spell it for the record.

14 THE WITNESS: My name is Robert L. Denney,  
15 D-e-n-n-e-y.

16 DIRECT EXAMINATION BY MR. CONNOLLY:

17 Q. Good afternoon, Mr. Denney. What is your occupation?

18 A. I'm a forensic neuropsychologist at the U.S. Medical  
19 Center for Federal Prisoners in Springfield, Missouri, and I  
20 am also an assistant professor and director of  
21 neuropsychology at Forest Institute of Professional  
22 Psychology.

23 Q. What do you do at the U.S. Medical Center in  
24 Springfield, Missouri?

25 A. My job is actually to -- for the most part twofold: One



1 major part of my job is to provide mental health services for  
2 all of those federal inmates and detainees that are sent to  
3 the U.S. Medical Center for surgical and medical needs. Our  
4 hospital is a medical-surgical psychiatric hospital, and I am  
5 the psychologist in charge of the medical and surgical  
6 people.

7 In addition to that job, I am -- as a  
8 neuropsychologist, I provide neuropsychological services to  
9 the medical and surgical services, as well as the mental  
10 health treatment and forensic services of the hospital.

11 Q. Before your current duties, was there something else  
12 that you did at the medical facility in Springfield,  
13 Missouri?

14 A. Yes. I started the work in the medical and surgical  
15 side of the hospital in 2000, but from 1992 -- actually from,  
16 yes, January of 1992 up through 2000, I was doing full-time  
17 forensic studies for the U.S. District Courts.

18 Q. Your qualifications are laid out in the resume' that's  
19 been submitted to the Court?

20 A. Yes, they are.

21 Q. Do you have any board certifications?

22 A. Yes, I do.

23 Q. What are they?

24 A. I'm board-certified in forensic psychology. I'm also  
25 board-certified in neuropsychology by two different boards.

1 Q. Okay. And just very quickly, what are the boards that  
2 have certified you?

3 A. The American Board of Professional Psychology, ABPP for  
4 short, has certified me in the area of forensic psychology  
5 and neuropsychology.

6 Q. Let me ask you this: Is there anything unique about  
7 those two certifications from the same certifying body?

8 A. Well, unique in the sense that not very many people have  
9 both of them.

10 Q. How many people have both of them?

11 A. Three.

12 Q. Three. Where? Three in Missouri, three in the United  
13 States? Three where have the same two certifications?

14 A. Oh, three, three anywhere.

15 Q. Anywhere. And, very quickly, in what areas have you  
16 published articles and/or books and/or chapters?

17 A. Most of the publications you'll see on my vitae deal  
18 with the application of neuropsychology in the criminal  
19 forensic setting, really the blending of forensic psychology  
20 and neuropsychology. But I also have several chapters and  
21 papers dealing with the detection -- and a book -- dealing  
22 with the detection of deception and identifying malingering.

23 Q. And do you consider those areas you've just identified  
24 as your areas of specialty?

25 A. Yes.

1 Q. Any other areas of specialty?

2 A. Well, beyond general forensic and neuropsychology, no.

3 Q. What does the medical facility in Springfield, Missouri,  
4 do?

5 A. Well, we provide medical and surgical services for all  
6 of the detainees, so to speak, of the Attorney General in the  
7 Bureau of Prisons. We are one of four or five medical  
8 centers around the system, so prisoners, inmates who are  
9 sentenced will be referred to us for medical, psychiatric, or  
10 surgical treatment. And then we also provide mental health  
11 evaluations and mental health treatment to restore people to  
12 competency, specifically for the U.S. District Courts.

13 Q. How many neuropsychologists are employed at the  
14 facility?

15 A. One.

16 Q. That's you?

17 A. Yes.

18 Q. During the course of your employment at the medical  
19 facility, how many competency evaluations have you performed?

20 A. Not including the consultations I've performed, just the  
21 ones that I've actually directed myself, approximately 400  
22 competency.

23 Q. In this particular case, did you do a competency  
24 evaluation?

25 A. Not per se, no. I was asked as a consultant to provide

1 neuropsychological services.

2 Q. You know Charles Carrington?

3 A. Yes, I do.

4 Q. How do you know him?

5 A. He was referred to me by Dr. Preston for  
6 neuropsychological assessment.

7 Q. Do you know why he was referred to you?

8 A. My understanding is that she referred him to me because  
9 during prior reports, I believe it was Dr. Mart's report,  
10 discusses the fact that he was concerned there may be some  
11 concern there may be some neurocognitive deficits.

12 Q. During your evaluation of Charles Carrington, did you  
13 find any neurocognitive dysfunction?

14 A. Well, it was impossible to say for sure because it was  
15 clear that he was attempting to present himself much worse  
16 than he truly is regarding neurocognitive functioning. So I  
17 can't say that I could find neurocognitive functioning  
18 because it was covered by a very poor effort.

19 Q. And we'll get to that. Tell us what it means to be  
20 classified as mentally retarded or mildly mentally retarded.

21 A. Well, when we talk about mental retardation as a  
22 classification, a person has to meet certain requirements  
23 that somewhat vary, but they're basically this; that a  
24 person's IQ score is down near the 70 range or below, and  
25 that they also at the same time have significant deficits in

1 their functional living skills. And so when those two come  
2 together, if they are both low enough, then a person can be  
3 considered classified as mental retardation. That's to be  
4 contrasted to the notion that somebody's just a little bit  
5 retarded or a little bit slow or the like.

6 Q. Based on your evaluation, do you have an opinion as to  
7 whether Charles Carrington is mildly mentally retarded?

8 A. Yes, I do.

9 Q. What's that opinion?

10 MR. SHEA: Objection. I just don't feel like  
11 there's been enough groundwork of where this would come  
12 from. I mean, he was asked if --

13 THE COURT: Overruled. You can cross him on it and  
14 move to strike it if. . .

15 Q. What is that opinion?

16 A. It's my opinion that Mr. Carrington does not meet what I  
17 would consider the classification or the requirements to be  
18 considered mentally retarded.

19 Q. You identified two requirements, correct?

20 A. Yes.

21 Q. In your opinion, did he meet either of those  
22 requirements?

23 A. Not based on the information I had available to me, no.

24 Q. Do you have an opinion as to what range of intellectual  
25 ability Mr. Carrington falls into?

1 A. Yes.

2 Q. What range?

3 A. In my professional opinion, I believe that his  
4 intellectual ability falls within what would be called the  
5 below-average range, which is a range below normal. There's  
6 a normal range and then there's the below-average range -- or  
7 I should say average range, and below that there is the  
8 below-average range, and then there is a range called  
9 borderline range, and then there's the mild mental  
10 retardation range. I believe he falls in the below-average  
11 range, which is below average but above borderline and  
12 certainly above mental retardation.

13 Now, I would concede it's probably the lower  
14 portion of that range, yes, but in that range.

15 Q. What were you evaluating Mr. Carrington for?

16 THE COURT: Well, how do you know that?

17 THE WITNESS: Two basic areas come together to help  
18 me understand this or to come to this conclusion.

19 MR. CONNOLLY: We are getting there.

20 THE COURT: All right, I'm sorry.

21 MR. CONNOLLY: No, I'm starting with the general  
22 and, of course, am going to get to, I think, the answers  
23 you're asking for, your Honor.

24 THE COURT: All right.

25 Q. What were you evaluating Mr. Carrington for?

1 A. I was evaluating him for, first of all, the presence of  
2 neurocognitive deficits in general, which could include the  
3 effects of mental retardation or the effects of brain injury  
4 or other learning disabilities. All of that falls under the  
5 general notion of neurocognitive deficits.

6 Q. You performed various tests to evaluate these issues?

7 A. Yes, a wide number of tests.

8 Q. Do you know approximately how many tests you gave?

9 A. Twenty-three, depending on how you classify the tests,  
10 but, yes, I would say twenty-three.

11 Q. Did you identify those in your report?

12 A. Yes, I did.

13 Q. In general terms, what were those tests designed to do?

14 A. There were tests in there designed, number one, to  
15 identify poor effort. All of the psychological tests are  
16 plagued, I guess you could say, with the difficulty that they  
17 require the person to perform effort, to apply themselves.  
18 Unlike sitting in a CT scanner where somebody just needs to  
19 be still or even is unconscious, psychological tests require  
20 the person being tested to put forth effort. So some of the  
21 tests I use are called effort tests to measure whether or not  
22 the person is indeed putting forth adequate effort.

23 Then there is a cluster of tests geared more  
24 towards general intellectual functioning, and then there is a  
25 group of tests geared more towards attention concentration

1 and memory, the more pure neuropsychological type of tests.

2 Q. In the tests to identify effort or poor effort, do you  
3 have a term you use to refer to those tests?

4 A. Validity tests or effort tests.

5 Q. Are those tests, the validity tests or the effort tests,  
6 are they all stand-alone tests where you give a test, and the  
7 test alone simply identifies only whether or not there's  
8 effort? Are they all stand-alone tests, or are some of them  
9 mixed in with the actual neuropsychological evaluations?

10 A. Actually, in that regard, they may be better termed  
11 indices or measures. There are some freestanding tests of  
12 effort that I incorporated. That would be six different  
13 tests that are designed for that particular purpose. And  
14 then there are indices built within the other standard  
15 psychological and neuropsychological tests which you can also  
16 look at to see whether or not the results suggest the person  
17 was putting forth adequate effort.

18 Q. And based on those validity tests or effort tests, what  
19 did you find?

20 A. That clearly Mr. Carrington was not putting forth  
21 adequate effort in the tests as far as effort to appear his  
22 best. There's actually signs of him putting forth effort to  
23 appear impaired.

24 Q. On how many of the tests did you find that the defendant  
25 did not apply himself or gave a poor effort?



1 A. Of the fourteen different indices in the entire battery,  
2 seven of them were positive. Of the six freestanding effort  
3 tests, five of them were positive, suggesting a poor effort.

4 Q. And of those tests, were any of more significance to  
5 your evaluation than others, of particular significance?

6 A. Yes. There were two of them that were particularly  
7 meaningful for me.

8 Q. Which ones?

9 A. The Word Memory Test and the Validity Indicator Profile,  
10 or VIP.

11 Q. The first test you identified, you also referred to that  
12 as the WMT?

13 A. Yes.

14 Q. Word Memory Test? In general terms, tell us what the  
15 WMT test is, what it tests for and what the significance is  
16 of that test.

17 A. Well, number one, it's an effort test. It's a validity  
18 test. It's designed to identify when people are not putting  
19 forth their adequate effort. But it's designed in such a way  
20 that it actually also includes real live verbal memory  
21 indices in it, so you get an image of both their effort and  
22 their potential real verbal memory skills, and it looks like  
23 a general verbal memory test.

24 Q. What were the results?

25 THE COURT: Well, like, give me an example of how

1 you can tell whether someone is not putting forth effort as  
2 opposed to just doesn't know.

3 THE WITNESS: Very good. The test is designed such  
4 that it's not open-ended. They have to choose between  
5 alternatives. We'll talk about the effort indices first of  
6 all, and those are designed where somebody has to respond and  
7 even guess, if they have to. And those indices -- there's  
8 three of them as part of this test -- are actually -- they  
9 look difficult, but in fact they're not sensitive to real  
10 brain injury, except in the most extreme cases.

11 THE COURT: Like what? Give me an example.

12 THE WITNESS: Okay. I can explain the test. So  
13 it's computer administered, and it presents --

14 THE COURT: So somebody sits at a computer screen?

15 THE WITNESS: Exactly right. And I describe --  
16 they're actually on the screen, it says the directions, and  
17 then I also say the directions or verify that the defendant  
18 can read the directions. And then it presents word pairs on  
19 the screen, first word and then another word paired with it.  
20 And then the person looks at it for a minute. Then they go  
21 away.

22 THE COURT: Like "blue sky."

23 THE WITNESS: Yes, yes, just like that. So let's  
24 say "blue sky" or "man woman," something like that. And he's  
25 asked to watch this carefully and remember them. And so it

1 goes through the list of words once.

2 THE COURT: How many at a time?

3 THE WITNESS: There are forty words total.

4 THE COURT: So there are pairs of, like, twenty  
5 pairs?

6 THE WITNESS: Correct.

7 THE COURT: So "blue sky, man woman, boy girl,  
8 Republican and Democrat," whatever it is, you have twenty  
9 pairs, and he has to read all twenty pairs at once?

10 THE WITNESS: Well, they are presented one after  
11 the other.

12 THE COURT: So it isn't as if you say "boy girl,"  
13 and then the screen goes blank, and you say, "What goes with  
14 boy?"

15 THE WITNESS: No. You go through the whole list  
16 once. You go through the whole list again, same words, so  
17 they go through them once. And then immediately afterwards  
18 they are faced with two words on the screen. One of them was  
19 from that list. One of them was not. It's a foil. And the  
20 person has to choose between one of the two. And if they  
21 don't know, they make their best guess.

22 Do you understand so far?

23 THE COURT: Yes.

24 THE WITNESS: So after they go through all forty of  
25 those, then there's a half an hour delay. And then you give

1 the same test again without the presentation at the  
2 beginning, just the memory live test where they have to  
3 choose between the two words. So that's an immediate  
4 recognition test and a delayed recognition test. Those  
5 aspects of this test are really more the effort-related  
6 aspects of the test. Then after that there's a multiple  
7 choice.

8 THE COURT: All right, so how do you know? Let's  
9 say you go through all these and somebody just doesn't  
10 remember that Republican was mentioned or Democrat was  
11 mentioned or whatever, just doesn't remember. How do you  
12 know that's because the guy is retarded as opposed to the guy  
13 isn't trying?

14 THE WITNESS: Because there are more than  
15 fifty-four different reference groups called "norms" that we  
16 can compare this person's score versus these other groups.

17 THE COURT: You mean similar IQ levels?

18 THE WITNESS: Similar IQ level, different ages,  
19 different educational levels, different types of brain  
20 damage, different issues, dementia, mental retardation,  
21 children, all sorts of different clinical groups. And, first  
22 of all, what research has shown about those tests is, those  
23 three indices are not sensitive to genuine brain impairment,  
24 with the exception of the extreme, somebody who's moderately  
25 or severely demented and not living on their own, or somebody

1 who is severely -- well, even severely brain injured doesn't  
2 necessarily impact these indices. They will impact the other  
3 part of it, here the multiple choice, free recall things,  
4 because those really do tap into functions that are  
5 difficult. But these look hard, but they're really rather  
6 easy.

7 So, for example, in Mr. Carrington's situation, I  
8 can compare his performance with other groups such as  
9 simulators, people who are faking, to see what they look like  
10 on the test. I can compare him to mentally retarded adults,  
11 and I did actually in that instance. And you can see that  
12 his pattern of scores -- well, you can't probably see this  
13 from here, but --

14 THE COURT: You're giving me more credit than --

15 THE WITNESS: You've got tremendously good eyes.  
16 But the scores -- and not only his scores fall below the  
17 cutoff that you would see for malingerers, for people who are  
18 not putting forth the best effort, but also his profile is  
19 consistent with those people who are actually simulating,  
20 trying to look impaired. And yet compared to up here, these  
21 are people -- they're the scores of the people who are honest  
22 to goodness mentally retarded -- are in the normal range  
23 because these are not difficult. They look difficult, but  
24 they're really not.

25 THE COURT: So you'll take people who -- not you

1 personally, but you'll have a set of metrics of people who  
2 you know are mentally retarded and you know are putting in a  
3 good effort, and you can see in general what they'll get?

4 THE WITNESS: Exactly right.

5 THE COURT: So when you say somebody who you know  
6 is mentally retarded, what IQ range is that?

7 THE WITNESS: The range on that -- boy, off the top  
8 of my head --

9 THE COURT: Is that just below 70, or do you  
10 distinguish?

11 THE WITNESS: Well, they are predominantly in the  
12 mildly mentally retarded range, but definitely below 70, yes.

13 THE COURT: And he's at what, 79, right? Something  
14 like that, right?

15 MR. CONNOLLY: Well, that's what Dr. Mart said. I  
16 don't think that's the opinion of this expert, your Honor.

17 THE WITNESS: I don't recall 79 coming out, except  
18 maybe --

19 Q. Does this test spit out the person's IQ?

20 A. No. No, the reason this test is important for me is  
21 because I can compare his performance to genuine mentally  
22 retarded people, and they performed much better than he did.  
23 So either he's a simulator, or he's got very, very severe  
24 cognitive problems, such as consistent with somebody who  
25 would be in a nursing home. There's another test like the

1 WMT which --

2 Q. Can I ask a question before you get to the next test?

3 A. Yes. Actually, I was going to bring up a different  
4 test, but go ahead.

5 Q. Yes, before you do, the words that come out during the  
6 first part of the test, are any of those complex words?

7 A. No. They all have a reading level of about second  
8 grade.

9 Q. I'm sorry, continue.

10 THE COURT: A simulator I'm assuming means someone  
11 who's trying to manipulate it?

12 THE WITNESS: Yes, somebody who is intentionally  
13 trying to manipulate the test, trying to look impaired.

14 THE COURT: So you hire people.

15 THE WITNESS: I didn't, but Dr. Green did.

16 THE COURT: Yes, they hire people to try to fake  
17 out the test?

18 THE WITNESS: Yes.

19 THE COURT: All right, so you have two sets of  
20 metrics, those you know were intentionally trying to  
21 manipulate and those you know are severely retarded or of  
22 nursing home level, and those are the guideposts you measured  
23 him against?

24 THE WITNESS: Yes, on that particular test, I  
25 measured him against mentally retarded people and

1     simulators.

2             There is another test that works the same way as  
3     the WMT. It's kind of like the little brother to the WMT.  
4     It's called the MSVT, Medical Symptom Validity Test.

5             THE COURT: Medical?

6             THE WITNESS: Symptom Validity Test, or MSVT, and  
7     it works the exact same way, except instead of forty words,  
8     there's only twenty words, there are ten pairs. And they are  
9     simpler words that have even stronger associations to them,  
10    like "ice cream, pizza topping, soccer ball," those type of  
11    things. And when somebody fails this one, I will inevitably  
12    give them this test because I want to verify that they're not  
13    failing because of true, genuine cognitive problems. I want  
14    to make sure I'm not making a mistake here, so I'll give them  
15    this test. And Mr. Carrington passed the first two scales  
16    immediately, and then recognition and the delayed  
17    recognition, but the consistency between the two of them,  
18    which is the third index of that, he failed. And looking  
19    at --

20            THE COURT: You just lost me. What do you mean,  
21    the consistency between what, the one immediately and the one  
22    in a half an hour?

23            THE WITNESS: Yes. This one actually has only a  
24    ten-minute delay because this is much, much simpler.

25            THE COURT: So he remembered things when, right



1 away but not later on?

2 THE WITNESS: Yes, he remembered different items,  
3 which doesn't make a lot of sense because if you remember  
4 certain items during the initial presentation, then ten  
5 minutes later you remember different items, okay, so -- and  
6 yet both of those he remembered enough, but the consistency  
7 wasn't there. So it's a very sophisticated measure of their  
8 ability, suggesting poor effort.

9 Q. Can I make sure I understand that?

10 THE COURT: Let's see how your cognitive memory is.

11 Q. You show the ten-word pairs, and he's asked to associate  
12 one with the other; is that correct?

13 A. No. He's just simply asked to recognize them from two  
14 words on a screen. One was correct; one was not.

15 Q. Okay. And you're saying that ten minutes later, it was  
16 kind of like he got different ones correct than he did the  
17 first time around?

18 A. Exactly, that's exactly right. That inconsistency  
19 doesn't make a lot of sense. And with this one, I was able  
20 to compare his performance to people with very early  
21 dementia. He actually performed a little better than they  
22 did but not nearly as well as -- and he did better than  
23 severely demented individuals, but much less than  
24 learning-disabled children, much poorer than twelve-year-old  
25 learning-disabled children. And that was very interesting to

1 me because of the concerns about him having a learning  
2 disability, and his scores were much lower on measures that  
3 are not truly measures of function for that group. So I got  
4 a comparison of --

5 THE COURT: Doesn't it matter what kind of learning  
6 disability?

7 THE WITNESS: Well, these were -- that could  
8 potentially make a difference because they are -- most of the  
9 learning disabilities focus in the same part of the brain.  
10 The reading, writing, arithmetic all cluster together in the  
11 same location, and they are in general terms considered  
12 verbal learning disabilities, although one could argue a  
13 mathematics learning disability is different. But these  
14 would all be verbal learning disability individuals. And  
15 actually the mathematics part for the most part is in the  
16 same part of the brain. It's the left angular gyrus part of  
17 the brain back here by the temporal lobe. But there are  
18 nonverbal learning disabilities as well, a very different  
19 situation and coming from the right side of the brain, but,  
20 no, these would all be left hemisphere.

21 Q. Tell us what the VIP test is.

22 A. The Validity Indicator Profile was the other test that  
23 was significant for me, and actually I think it was more  
24 significant. The Validity Indicator Profile is also an  
25 effort test, but it's a test that was designed out of an

1 intelligence test. So rather than a memory-based type of  
2 paradigm like the WMT and the MSVT are, this is an  
3 intellectual abilities paradigm. Like the other test, it is  
4 a two-alternative forced choice test, which means you have  
5 to -- forced choice meaning you have to choose one answer or  
6 the other, and it's two alternatives. Okay, so even if you  
7 don't know the answer, you have to guess at one of them all  
8 the way through. Actually, the test is divided into a verbal  
9 subtest and a nonverbal, but --

10 THE COURT: Like what?

11 THE WITNESS: Well, the verbal part of it is where  
12 a person has to define a word -- well, there's one word  
13 there, and then there's two other words over here. And you  
14 look at the first word and you decide, okay, what does that  
15 word mean, and which of these two words best means the same  
16 thing? And they have to choose between those two words.

17 THE COURT: So "night" and "evening"?

18 THE WITNESS: Yes. Let's say the word is "night,"  
19 like you say, and over here we would have "evening" and  
20 "breakfast." Well, "breakfast" is clearly wrong. It has no  
21 relationship to "night" at all, but "evening" would be right,  
22 so you can choose that. And they are clearly right and  
23 clearly wrong. And the words vary in their difficulty. Some  
24 are very, very simple because, again, these words come out of  
25 an IQ type of a testing. Some are very, very simple, but

1 some are very, very difficult. That's the verbal part of the  
2 test.

3 THE COURT: And what level of difficulty will it go  
4 to? Like what? Can you give me an example? Like the SAT  
5 level or --

6 THE WITNESS: Yes, oh, yes, very difficult.  
7 There's words on there that I don't know the answer to. I  
8 could look in the manual, but as far as, yes, it's very  
9 difficult. That's the verbal part, which doesn't concern me  
10 quite as much right now. The nonverbal I think is the part  
11 of the test that really tells us something significant here.  
12 It is also two-alternative forced choice, but instead of a  
13 verbal paradigm, it's a nonverbal paradigm. They are  
14 patterns. Like, maybe there's a pattern of -- and I'm making  
15 this up, but maybe a pattern of forward/forward/forward/blank.  
16 And then there's two patterns up here; one is a forward slash  
17 and another is a backwards slash. One is clearly right, one  
18 is clearly wrong, and they have to choose which one of these  
19 best fits the pattern. The whole test is like that. And it  
20 actually comes out of the Test of Nonverbal Intelligence, so  
21 it was originally an intelligence test, but then it was  
22 created into an effort test by making it two alternatives  
23 instead of four alternatives, and forced choice, and mixing  
24 up all of the items in random order. So some of the items  
25 are extremely easy, simple, because they're designed for

1 people with significant mental retardation to get right; and  
2 yet some of the items are so difficult that, honestly, I look  
3 at them and I still can't figure out what the pattern is  
4 supposed to be, okay. But there is a right and a wrong, and  
5 people who are exceptionally bright understand that. So it's  
6 got a gradient of difficulty, but it's a two-alternative  
7 forced choice test.

8           So if somebody was blindfolded and came in to take  
9 this test blindfolded, okay, they weren't even looking at the  
10 images but they had to answer, some they're completely  
11 guessing, their scores should fall within an approximate  
12 random range, like flipping a coin. If you flip a coin many,  
13 many times, and every time it's a head you give it a 1, and  
14 every time it's a tail you give it a zero, if you flip it  
15 multiple times, it's going to approximate .50, 50 percent.  
16 That's the way this test works.

17           And so if somebody is not blindfolded but they're  
18 putting forth a good effort, their score is going to fall  
19 above the random range, right? But if they're not putting  
20 forth effort, it could fall in the random range. Or if we're  
21 talking just items are too difficult, it could be in the  
22 random range. But if their score falls below the random  
23 range, that also tells us that they were getting it right  
24 because they knew the right answer, but they intentionally  
25 chose the wrong answer. And that's exactly what

1 Mr. Carrington did.

2 THE COURT: Well, how far below random did he  
3 fall?

4 THE WITNESS: Well, if he had been blindfolded, his  
5 score was so poor -- now, some of these people that are  
6 blindfolded will score below the random range or above the  
7 random range by dumb luck, but the odds of that happening --  
8 so, in other words, if Mr. Carrington actually was  
9 blindfolded and had no ability whatsoever, the odds of that  
10 actually happening would be only four out of one million  
11 times.

12 THE COURT: Say that again.

13 THE WITNESS: If I were to take somebody in off the  
14 street, and they had no ability whatsoever, okay, somebody  
15 who is grossly mentally retarded to the point where they have  
16 no ability whatsoever, and I gave it to one million people,  
17 four of those people would produce a score as badly as  
18 Mr. Carrington. That's an extremely low statistical  
19 probability. It's virtually impossible. And that's assuming  
20 no ability whatsoever, and clearly Mr. Carrington has ability  
21 because he was able to walk and talk and understand the  
22 directions of the test and those sort of things. So that  
23 performance was indicative of not only poor effort, as far as  
24 trying to look their best on the test, but actually they  
25 applied effort to appear impaired, and that's what

1 Mr. Carrington did.

2 The other thing that is significant for me  
3 regarding that -- and again it goes back to the fact that  
4 this was originally an IQ test -- you can also take those  
5 scores and figure an approximate intellectual ability, okay,  
6 because, remember, if they suppress below random, that means  
7 they knew the right answer in order to get the wrong answer.  
8 So let's flip that over, and assuming that they know those  
9 answers, what type of an IQ would that be? And doing that,  
10 his score came out to fall within the at least as good as the  
11 below-average range, clearly above mental retardation, and,  
12 in my opinion, above borderline range even.

13 Q. Your finding concerning Mr. Carrington's intellectual  
14 ability, that's obviously inconsistent with the finding of  
15 Dr. Mart, correct?

16 A. Yes.

17 Q. You've reviewed Dr. Mart's report, correct?

18 A. Yes, I did.

19 Q. Is there a reason you didn't just rely on the results of  
20 Dr. Mart's testing?

21 A. Dr. Mart administered good tests as far as intellectual  
22 functioning and such. My concern there, though, is that he  
23 only administered one test designed to measure effort, and  
24 that test is notoriously known for its insensitivity. It's  
25 not a very sensitive test. It doesn't tend to pick up

1 malingerer in many of the cases.

2 Q. What test is that?

3 A. That's the Rey 15-Item Memory Test.

4 THE COURT: Is there any peer-reviewed literature  
5 that would say that?

6 THE WITNESS: Yes, there is. There's a lot of it  
7 actually, several reviews. I can think of a review from 2002  
8 out of the Journal of Forensic Neuropsychology by Richard  
9 Frederick reviews that, and also points out that -- doesn't  
10 recommend using that test as a freestanding test of effort,  
11 and in fact it probably wouldn't meet a Daubert challenge.  
12 Then there are other reviews talking about various  
13 malingerer tests, including the Rey 15, that suggest it's  
14 not very sensitive. Kyle Boone in --

15 THE COURT: Have your tests been peer reviewed?  
16 The VIP, the Medical Symptom Validity Test, and there was one  
17 other, have they all been peer reviewed?

18 THE WITNESS: Yes, they have, yes. And the  
19 research shows that the WMT is probably one of the most  
20 sensitive tests to detect real effort.

21 THE COURT: The baby brother test?

22 THE WITNESS: No. That was actually the big  
23 brother test.

24 THE COURT: The big one, the big one.

25 THE WITNESS: However, the baby brother test looks



1 like it's probably more sensitive than many others,  
2 particularly for the amount of time it takes. It's a very  
3 good test.

4 Q. Does your facility ever use that Rey 15 test?

5 A. Oh, I use it all the time, but I do some things with  
6 it. I also include Dr. Boone's recognition test that goes  
7 with it. She's a neuropsychologist out of Harborview in LA  
8 that developed a recognition test for it, and it's actually  
9 some of her literature that shows that it's not very  
10 sensitive by itself. If you use the recognition test, that  
11 increases its sensitivity from somewhere in the 50 percent up  
12 to the 60 to 70 percent, but still I wouldn't rely on that  
13 test as a sole measure of effort.

14 Q. You wouldn't rely on it alone?

15 A. Correct.

16 Q. To a reasonable degree of psychological certainty, do  
17 you have an opinion as to whether Charles Carrington suffers  
18 from a mental disease or defect?

19 A. Yes, I do have an opinion.

20 Q. What's that opinion?

21 A. It's my opinion that Mr. Carrington does not suffer from  
22 a mental disease or defect.

23 MR. CONNOLLY: Robert, could I see Exhibit 5.

24 May I approach the witness, your Honor?

25 Q. Showing you what's been marked as Defendant's Exhibit 5,

1 at the bottom of Page 6 -- this is Dr. Mart's report --  
2 you've reviewed that portion of the report?

3 A. Yes, I have.

4 Q. Okay. And do you see a chart there at the bottom that  
5 gives some scores?

6 A. Yes.

7 Q. Okay. And what do those scores pertain to, according to  
8 Dr. Mart?

9 A. These scores relate to Mr. Carrington's performance on  
10 the Reynolds Intellectual Assessment Scales. It's a type of  
11 IQ test.

12 Q. Are you familiar with that test?

13 A. Yes.

14 Q. Is it a reliable test?

15 A. Yes, I believe it is.

16 Q. Is there anything about the results you see there --

17 THE COURT: What are the results?

18 MR. CONNOLLY: I apologize. You know what, I  
19 should --

20 THE COURT: What am I looking at? Who's Mart? Is  
21 that marked?

22 THE CLERK: Yes.

23 MR. CONNOLLY: I'll pass up an extra copy, your  
24 Honor.

25 THE COURT: That's the defendant --

1 MR. CONNOLLY: Yes, your Honor.

2 THE COURT: That's the one I have.

3 THE CLERK: Yes.

4 THE COURT: All right.

5 Q. Anything about those results that would or anything  
6 about that test that would render the results less reliable?

7 A. Well, as Dr. Mart correctly pointed out here, there is a  
8 20-point difference between Mr. Carrington's verbal  
9 intelligent index of 58 and his nonverbal intelligence index  
10 of 78. And this 20-point difference between the verbal and  
11 nonverbal skills suggests that his functional abilities are  
12 likely to fall in the borderline range. What that tells us  
13 and me is that big splits suggest that the composite score is  
14 probably less accurate. Whenever you have a large split  
15 between two major indexes like that inside a composite  
16 battery test, the composite from those two indices is less  
17 valid. It's less valid, meaning it's less accurate. And his  
18 composite of 59 probably does not reflect accurate level of  
19 intelligence.

20 THE COURT: Well, why wouldn't you take the highest  
21 one then? In other words, you don't -- when I mentioned 79,  
22 I think that's where I actually got that figure from, which  
23 is the highest of the scores. You think it's not even that  
24 low, right?

25 THE WITNESS: Correct. I think it's slightly

1 higher, and I think it's in the low 80s, but 79, I wouldn't  
2 quibble too terribly much about it. And some people could  
3 argue that or would argue to take the highest, but these  
4 tests have some error in them, and that error goes two ways.  
5 It can go above and below a little bit. So just taking the  
6 high one isn't necessarily the right thing to do. But when  
7 the two indices are so split, you can't just take the average  
8 between the two of them either. And Dr. Mart notes right  
9 here, "The discrepancy between his scores in these areas  
10 suggest he may suffer from a language-based learning  
11 disability." Well, if that's the case, that's what would  
12 suppress the language IQ score. So if we took that out and  
13 it bumped up, then the composite would probably be closer to  
14 79, 80, something like that. And in that sense, it might be  
15 a better reflection of his general intellectual ability.  
16 Again, that's assuming he's providing his best effort on this  
17 test, and I have no way to verify that. I don't know that  
18 that's true, and I don't think that enough tests were used to  
19 for sure determine that.

20 Q. Aside from clinical testing, is there anything about  
21 your interaction with Mr. Carrington that helped confirm for  
22 you your belief of where his intellectual ability falls?

23 A. That's the other side of this coin, or there's two  
24 issues. You asked earlier, what was it that suggested to me  
25 that his intellectual ability is higher? One of them were

1 the VIP test results that empirically demonstrate a level of  
2 intellectual functioning that is higher than -- well above  
3 mental retardation range.

4 The other thing which strikes me as indicative of  
5 his intelligence being higher than the mental retardation  
6 range is simply his demeanor, his behavior, his  
7 verbalizations. Interacting with him during the testing  
8 sessions, interviewing him, he often used elegant rationales  
9 for making an argument. For example, he would say that he's  
10 got learning a disability; he's only got, say, a third-grade  
11 reading level; he would often repeat, and he would say that  
12 he can't spell. But in the midst of that argument he was  
13 making to me, he looked in my file cabinet and said, "Like  
14 that word up there, 'unclassified,' now, I wouldn't be able  
15 to spell that word," in quotes. Well, that's a pretty  
16 difficult word for somebody who's mentally retarded to read  
17 "unclassified." And many times he --

18 THE COURT: Is that an actual example?

19 THE WITNESS: Yes, it is an actual example, yes,  
20 ma'am. Oftentimes he would make arguments for himself being  
21 not competent, or that I should follow the opinions of the  
22 prior evaluators, and in the midst of making that argument,  
23 he actually demonstrated a level of ability which went far  
24 beyond his claim of inability.

25 THE COURT: Well, if you assumed that his ability

1 was in the 78-79 range, would you be able to tell from the  
2 VIP that the scores were significantly below that. In other  
3 words, if you assume that this is correct, this IQ range that  
4 Dr. Mart put together --

5 THE WITNESS: Yes. The composite score?

6 THE COURT: -- would the number of false answers  
7 that he gave show malingerer? In other words, would another  
8 person of that equivalent IQ range have answered more things  
9 correctly?

10 THE WITNESS: No. There's two different concepts  
11 there. He created a malingerer profile on the VIP.

12 THE COURT: Right.

13 THE WITNESS: That would have occurred based on the  
14 fact that he was intentionally choosing wrong answers,  
15 irrespective of his ability, although it's related to his  
16 ability. This is a graph of the VIP running means. It's not  
17 the exact items, but it's the running means of every ten  
18 items overlapping, with the easiest items over here and the  
19 most difficult items over here. If a person is scoring along  
20 here, that means they're getting all of them right. If they  
21 score in the middle, that means they're getting half of them  
22 right. If they're scoring down here, they're getting all of  
23 them wrong. His scores down here show that he was choosing  
24 all wrong answers.

25 THE COURT: All right, so that's the VIP.

1 Remember, in the earlier tests you said to me, "Well, I can  
2 tell. I can look at the metric of someone who's really  
3 mentally retarded and the metric of someone who's in a  
4 nursing home," and you can tell that essentially his level of  
5 response was not in the mentally retarded range. Remember  
6 the original, the list of words.

7 THE WITNESS: Yes, ma'am.

8 THE COURT: And that he was answering at a level  
9 that even someone who's mentally retarded would have answered  
10 at. Wasn't that what you said?

11 THE WITNESS: Correct, and that is consistent with  
12 this because he scored up high enough to where it's beyond  
13 the range of mental retardation. People who score up to this  
14 range would fall in the below-average range, borderline to  
15 below-average range. So that's consistent with the fact of  
16 the other tests showing that he doesn't fall in the same  
17 range as somebody who is mentally retarded, again, supporting  
18 that his IQ is higher than what he is attempting to present.

19 MR. CONNOLLY: I don't have anything further, your  
20 Honor.

21 THE COURT: Do you have access, Mr. Shea, to all  
22 this underlying data?

23 MR. SHEA: No.

24 THE COURT: I think at some point he'll need to get  
25 that.

1 MR. CONNOLLY: He's welcome to it all, your Honor.

2 MR. SHEA: I want it, yes. I mean, to effectively  
3 cross-examine, I'm going to need it.

4 THE COURT: Why don't you just start, and then  
5 you'll provide copies.

6 MR. CONNOLLY: Not a problem. And I would likewise  
7 ask for the same from Dr. Mart. I never received that with  
8 the initial disclosure before his testimony the last time, so  
9 I'd ask for the same stuff.

10 THE COURT: Sure.

11 CROSS-EXAMINATION BY MR. SHEA:

12 Q. Good afternoon. I know you're testifying somewhat from  
13 your report, but I'm more familiar with Dr. Preston, so bear  
14 with me a little bit. How many of the tests in --  
15 Dr. Preston lists sixteen tests, but the Halstead-Reitan  
16 Neuropsychology Test Battery is listed as one series, but  
17 there's a whole subset of tests. Did you give all of the  
18 same tests or different ones?

19 A. The tests that she's referring to are the tests that I  
20 administered.

21 Q. They are?

22 A. Yes. The Halstead-Reitan Battery is a conglomerate of a  
23 large number of independent tests.

24 Q. Okay, all right. Now, well, let me take you then to the  
25 Minnesota Multiphasic Personality Inventory Test. You gave



1 that test?

2 A. Yes.

3 Q. And that test has a validity indices built into it;  
4 isn't that correct?

5 A. Yes, it does.

6 Q. And when I say "validity indices," that's to check for  
7 malingerer, right?

8 A. That's one of the things it's designed to check for.

9 It's designed to check for a wide number of possible flaws in  
10 its -- I don't know how to say -- not just malingerer but  
11 inconsistencies, inability to read, a wide variety of things,  
12 not just malingerer but any sort of invalidity.

13 Q. Okay. And how did Mr. Carrington do on the validity  
14 indices in the Minnesota Multiphasic?

15 A. Let me pull that test out. And I need to say that --  
16 explain a little bit, if I may, explain that that particular  
17 test is a series of 567 statements that the test taker reads  
18 and then responds either "true" or "false" for themselves.  
19 And Mr. Carrington insisted that he read the test. It has  
20 supposedly from a sixth- to an eighth-grade reading level in  
21 it. And the validity scales for the most part are within  
22 normal limits. The VRIN scale is a bit high with a raw score  
23 of ten, but that would suggest some subtle inconsistency, but  
24 a minor amount, but for the most part it would be  
25 interpretable. It would be considered valid.

1 Q. Okay. And so he fell within acceptable validity range  
2 in that test, correct?

3 A. Yes. This is a general psychiatric difficulties test,  
4 which uncovers things such as suicidal intention, auditory  
5 hallucinations, visual hallucinations, paranoia. And the  
6 validity scales here suggest that he was not trying to  
7 overendorse that type of psychopathology. Likewise, it did  
8 not appear that he was trying to underendorse that kind of  
9 psychopathology.

10 Q. And how many questions are involved in that?

11 A. 567.

12 Q. 567.

13 A. Yes.

14 Q. And the tests that you mentioned, say the MSVT test, how  
15 many questions are involved in that test?

16 A. How many questions?

17 Q. Yes.

18 A. It's a series of twenty words paired up, so there's ten  
19 different word pairs.

20 Q. Ten different word pairs?

21 A. Yes.

22 Q. Is that ten questions then or twenty questions?

23 A. Well, it depends. There's twenty questions one time,  
24 twenty questions another time. And then there is a paired  
25 associate part of the test which would be ten more

1 questions. Then there is a free recall test which basically  
2 says, "Tell me all the words you can remember." And then  
3 there's a question at the end asking if they performed their  
4 best or not.

5 Q. And so what's the total number of questions?

6 A. Well, twenty and twenty is forty, fifty. Fifty plus a  
7 free recall question asking them to come up with as many of  
8 those words that they can remember, and then one little  
9 question at the end asking about their effort, so fifty-five  
10 or so.

11 Q. And there's a question at the end that asks them about  
12 their efforts?

13 A. Oh, yes, yes.

14 Q. Now, you had mentioned how the Rey 15 test was the one  
15 malingered test or validity test used by Dr. Mart, right?

16 A. Yes.

17 Q. And you had said that that was one that wasn't well  
18 respected in the literature for testing for that. Is that a  
19 fair recapitulation of your statement?

20 A. Yes.

21 Q. Now, you reviewed Dr. Mart's report, correct?

22 A. Yes, I did.

23 Q. Okay. And on the Rey 15 memory test, it did not show  
24 malingered, correct?

25 A. He did not. The results were not positive for

1 malingering, that is correct.

2 Q. Now, you gave the very same test, didn't you, the  
3 Rey 15?

4 A. Yes, I did.

5 Q. And when you gave that test, what did you find?

6 A. I found that he performed below that which one would  
7 expect and would be considered positive for what's  
8 technically called "negative response bias," but something  
9 akin to malingering.

10 THE COURT: Say that again?

11 THE WITNESS: Negative response bias. We're  
12 tossing this word "malingering" around a lot, and it's  
13 somewhat unfair. Malingering is a clinical determination.  
14 Each of these tests, with one exception, do not necessarily  
15 indicate malingering. They indicate negative response bias,  
16 that a person is not responding appropriately, or as good as  
17 they ought to, and it's for reasons other than neurocognitive  
18 problems. So it's really more precise.

19 THE COURT: Simply being tired?

20 THE WITNESS: Theoretically, although they would  
21 have to be really tired to where they're not even attending  
22 to the task, with the exception of the VIP. When you  
23 suppress something below random, then that really indicates,  
24 yes, malingering there. So I hate to toss the word  
25 "malingering" around, but, yes, I mean, I think the spirit

1 of your question is, yes, when I gave the Rey 15-Item Memory  
2 Test, he didn't do well on it, or he didn't do as well on it  
3 as he did when he took it with Dr. Mart.

4 Q. And he did it in a way that you felt was what? How  
5 would you describe it?

6 A. Positive for not applying his best effort to the task.

7 Q. Okay. So if one takes that, that variance between the  
8 Rey 15 scores, meaning not performing at his best effort, and  
9 no indication that he's not performing at his best effort,  
10 doesn't that lend credibility to the analysis, to the tests  
11 given by Dr. Mart?

12 A. Possibly, but I'm afraid that if we go too far down the  
13 road, we do a classic error of judgment. Absence of evidence  
14 is not evidence of absence, but it does raise --

15 THE COURT: It's too late in the afternoon. Wait a  
16 minute, what did you say? Say that again.

17 THE WITNESS: Absence of evidence --

18 THE COURT: Of malingering.

19 THE WITNESS: -- is not evidence of absence. Just  
20 because somebody performs within the normal range on  
21 something doesn't logically eliminate the possibility that  
22 they could still be feigning scores. And that goes back to  
23 the sensitivity of the test. If the test is not very  
24 sensitive, it doesn't pick it up. You can't be real  
25 confident about the test result when it's negative. However,

1 if a test is very specific, it only comes up positive under  
2 one condition, and it comes up positive, you can feel  
3 confident about that.

4 Q. Excuse me. But it's the same test you gave?

5 A. Yes, it is.

6 Q. And when you gave it, you got a dramatically different  
7 score than when Dr. Mart gave it, correct?

8 A. Yes.

9 Q. And so you take from that that he's performing at  
10 different levels at that point, correct?

11 A. On that particular test, yes.

12 Q. Right. And if one has dramatically different results on  
13 a test designed to check effort, don't you think that that  
14 can be read into whether one's providing that effort at those  
15 different times, the levels of effort at those different  
16 times?

17 A. As I said, yes, it can, but we have to be careful of a  
18 potential error in reasoning by assuming that simply because  
19 there's no -- the evidence is absent, you know. But you can  
20 surmise that, and it makes you wonder that maybe he was, but  
21 I don't know if I can feel real clinically confident that he  
22 was.

23 THE COURT: So you're saying he might have been  
24 putting in his best efforts for Dr. Mart but wasn't for you?

25 THE WITNESS: He might have been, but given the

1 other evidence I have in this testing suggesting that his  
2 true intellectual abilities are actually higher, and my own  
3 interaction with him which suggests to me clinically that his  
4 intellectual abilities is higher, I think that those scores  
5 were somewhat underrepresentative of his abilities. Maybe  
6 not by much. If you take out the verbal learning disability  
7 portion of it, then it's not much different, but it's above  
8 the mental retardation range when you do that.

9 THE COURT: Well, that may be, but --

10 THE WITNESS: But isn't significantly higher.

11 Q. Isn't your interaction with him and your determination  
12 of his intellectual ability from your personal interaction  
13 with him subjective?

14 A. Well, it's subjective in the sense that it's a personal  
15 interaction, but it's based on my interactions with hundreds  
16 and even thousands of individuals in a clinical setting.

17 Q. But, I mean, that's no different than my having  
18 interactions with thousands of individuals. That's not from  
19 a specialized knowledge. What I'm saying is, when you're  
20 giving the tests, these tests are set up to try and be  
21 objective, correct?

22 A. Yes, that's true.

23 Q. And not in ways that can be affected from our own  
24 subjective beliefs, meaning that when you give a test to  
25 Mr. Carrington, if you subjectively believe that he is --

1 where do you place him, borderline or above borderline?

2 A. Below average.

3 Q. Below average, so you subjectively believe he's below  
4 average. When you give the tests, the tests are supposed to  
5 be objective and removed from any belief that you may carry  
6 into the testing process, correct?

7 A. Yes.

8 Q. Okay. And so the tests are made to kind of attempt to  
9 eliminate any subjective bias that the test giver might have,  
10 right?

11 A. Yes, that's true.

12 Q. Right, as opposed to your human interaction with  
13 Mr. Carrington is exactly subjective and what those tests are  
14 designed to eliminate, correct?

15 A. Well, they are a more empirical way of looking at it,  
16 but, as you said, we can all get a sense for whether  
17 somebody's a little bit dull or a lot dull or not as dull.

18 Q. Right, but that's very subjective and based on the  
19 individual, right?

20 A. And their clinical expertise, yes.

21 Q. Well, I mean, but when you're speaking to someone,  
22 you're not necessarily using your clinical expertise, right?  
23 You're speaking to them just as I am speaking to you?

24 A. And when they are speaking back to me, I am listening  
25 with a clinical ear. For example, when Mr. Carrington talks



1 to me about when he was in Bridgewater and if they had forced  
2 medication on him, that would be a civil commitment under  
3 Rogers court, I step back and go, oh, that's an abstract  
4 concept, Rogers court. These are legal terms. Is he  
5 familiar with the Rogers cases? That's not something I would  
6 expect from somebody who is in the mental retardation range.  
7 It just suggests that it was higher to me.

8 Q. Well, let me take that on. What would you expect from  
9 someone who is institutionalized for most of their life, had  
10 been sent to someplace where that was concern of theirs, and  
11 when they sit in jail cells with people and talk about things  
12 like particular case names -- for instance, my subjective  
13 feeling on Booker or Fanfan as a federal attorney is that my  
14 most severely retarded clients to my most intellectual  
15 clients have heard of the fact that the Sentencing Guidelines  
16 have been eliminated.

17 MR. CONNOLLY: Objection to that, your Honor. He's  
18 just saying his opinion for the Court. It's not a question.

19 Q. No, but what I'm saying is that --

20 MR. CONNOLLY: He's saying that his clients who are  
21 mildly retarded, you know, I just don't think that's  
22 appropriate for questioning, him expressing his belief to the  
23 Court with prior clients.

24 THE COURT: He can ask a question. We're going to  
25 try and finish this exam by 5:00, so --

1 Q. Well, what I'm getting at is that the intellectual  
2 functioning, like knowing what a Rogers hearing is, is far  
3 different than having been exposed to prisoners repeatedly  
4 mentioning a named hearing, correct?

5 A. If -- I mean, I think I understand what you're saying,  
6 and yet that's correct in its simplest term. But when  
7 somebody is using it appropriately, that suggests there's at  
8 least a little bit more understanding there, and I haven't  
9 heard that kind of -- again, from my clinical perspective, I  
10 haven't heard that kind of discussion coming out of people  
11 who are bona fide mentally retarded.

12 Q. So people at your institution who know that if they're  
13 committed there, they may face -- well, that they may face  
14 commitment there, right?

15 A. Yes.

16 Q. Retarded people are capable of knowing that they may  
17 face commitment there, correct?

18 A. Yes, they are capable of that. Again, it depends on how  
19 they talk about it, whether it would be real sophisticated in  
20 their understanding.

21 Q. Right, but what you describe, Mr. Carrington didn't go  
22 into detail about what a Rogers hearing involved, correct?

23 A. He understood it to indicate potential forced medication  
24 against the individual's will.

25 Q. Right, but were you in a hospital where people were

1 medicated?

2 A. Yes.

3 Q. Okay, were you in a hospital where people were medicated  
4 against their will?

5 A. Yes.

6 Q. Was Mr. Carrington offered medication while he was  
7 there?

8 A. I believe so, but I'm not a hundred percent positive of  
9 that.

10 Q. So if a retarded person is in a hospital where people  
11 are forcefully being medicated and they've been offered  
12 medication, is it so strange that they may be aware of the  
13 idea of forced medication?

14 A. Again, that they're aware of it? No, I don't find that  
15 strange at all. How they talk about it or how they reference  
16 it in conversation may or may not be sophisticated.

17 Q. But referencing a Rogers hearing is similar to  
18 referencing, say, Miranda rights, right? I mean, it's a  
19 title, isn't it?

20 A. Yes.

21 Q. And so when I reference Miranda rights, that's something  
22 that retarded people who watch a lot of TV might be aware of  
23 that phrase, right?

24 A. Yes, they might be.

25 Q. And that sounds like a complicated phrase, right? "My

1 Miranda rights," right? I mean, it certainly is as  
2 complicated a phrase as "Rogers hearing," isn't it?

3 A. As far as a phrase goes, yes.

4 Q. Okay. But saying the phrase "Miranda rights" does not  
5 imply a knowledge of what those rights involve, does it?

6 A. I mean, correct, other than the general sense that this  
7 has to do with involuntary commitment and medication.

8 Q. No, but in terms of Miranda rights, it would mean right  
9 to not talk to the police, right? That's the implication?

10 A. Yes.

11 Q. But you can't necessarily take the implication from the  
12 statement of the phrase, correct?

13 A. That would be true, although I don't know if it's fair  
14 to compare Rogers court type of commitment reference to  
15 Miranda, which is so ubiquitous.

16 Q. Well, let's put it this way: In your history, you saw  
17 that Mr. Carrington had been at Bridgewater Hospital, right?

18 A. Yes.

19 Q. That's a place that people get committed to, right?

20 A. Yes, related to Rogers courts, yes.

21 Q. Yes, related to Rogers court, right, and where people  
22 are forced medication, correct?

23 A. Yes.

24 Q. And so now you know that he has a history in two  
25 locations with forced medication, correct?

1 A. You mean, the other one's U.S. Medical Center?

2 Q. Yes.

3 A. Where Rogers court is never used.

4 Q. I know, but the forced medication, yes?

5 A. Yes.

6 Q. Okay. And so it's your subjective analysis that that  
7 means that he is functioning at a higher intellectual level  
8 because he uses that phrase "Rogers court," right?

9 A. I wouldn't say that it is just that particular phrase.  
10 There is much more to my clinical opinion than just his  
11 reference to Rogers court, but that was consistent with the  
12 other findings in my mind to suggest that he's more  
13 intellectually capable than mental retardation.

14 Q. Well, let's get to that. Please point out to me the IQ  
15 tests you gave that showed that he had a score in the range  
16 of -- what was it, moderate?

17 A. The VIP suggested --

18 Q. Not the VIP because the -- I've heard you on the VIP,  
19 but the VIP is not directly an IQ test, is it?

20 A. It's not directly an IQ test, correct.

21 Q. Tell me of an IQ test that backs up your objective  
22 assessment of his intellectual capability.

23 A. The IQ tests that I administered to him, scores were  
24 much lower than that.

25 Q. What were his IQ test scores?

1 (Witness examining documents.)

2 A. Again, these IQ scores were a part of a battery that  
3 also included effort measures, suggesting he was not giving  
4 his best effort; but the scores, the verbal IQ score of 67,  
5 performance IQ of 68, and a full-scale score of 65.

6 Q. And where do those scores fall --

7 THE COURT: Where did you just point to?

8 THE WITNESS: These are IQ scores from an IQ  
9 battery that was administered.

10 THE COURT: What page? Do I have them or not?

11 THE WITNESS: No.

12 THE COURT: Oh, I'm sorry.

13 THE WITNESS: I did not list them in my report  
14 because it was my clinical judgment that these results were  
15 not valid and will be simply used to just confuse the Court.

16 MR. SHEA: Well, I'd ask that that be stricken.

17 Q. What I'm trying to get at here is, you have made an  
18 assessment of my client's intellectual range, right?

19 A. Yes.

20 Q. Okay. And what is that?

21 A. Okay, the results are not valid, in my opinion.

22 Q. No, no, but what did you say that his intellectual  
23 capability was? He was above borderline, right?

24 A. Yes.

25 Q. You said he's not mildly retarded, he's above

1 borderline, right?

2 A. Yes.

3 Q. Do you have any IQ test, objective IQ test which  
4 supports your finding?

5 A. As I have explained, no, I do not have a full IQ test  
6 for that.

7 Q. That's the answer, isn't it, "no"?

8 A. If you disregard the VIP results, yes.

9 Q. And let's go to the VIP results. The VIP test is not an  
10 IQ test, is it? What is the central point of giving the VIP  
11 test?

12 A. The central purpose of the test was to -- is to identify  
13 whether somebody is putting forth their adequate effort  
14 regarding intellectual functioning.

15 Q. Right. And so not to go back to that nasty word  
16 "malingering," but really getting to the bone of it, right  
17 of contention, what you're really looking for in the VIP test  
18 is effort and malingering, right?

19 A. Yes.

20 THE COURT: So let me just say, if you were to take  
21 Dr. Mart's score of 79, what does that put him in? Is that  
22 still not retarded?

23 THE WITNESS: Correct.

24 THE COURT: So that puts him in a borderline?

25 THE WITNESS: The high edge of the borderline

1 range.

2 THE COURT: Looking at his scores as you would  
3 interpret them, you would put him -- let's assume for a  
4 minute I accepted, which I don't know what I'm going to do,  
5 his scores, that would, in your view, put him at borderline?

6 THE WITNESS: If you remove the verbal learning  
7 disability component, that score of 79 is in the high range  
8 of the borderline range. It's right below the cutoff where  
9 the below-average range is, so, yes.

10 THE COURT: And if you were to include them all,  
11 how would I think about a composite score?

12 THE WITNESS: Well, I believe that composite score  
13 fell into the 50s, which is in the --

14 THE COURT: All right, 59. So what does that put  
15 him at?

16 THE WITNESS: Yes, it's in the lower portion of the  
17 mildly mental retardation. It's actually getting closer to  
18 moderately mentally retarded. I mean, it's a very poor  
19 score.

20 THE COURT: So it's a dramatic difference between  
21 all these different scores, is that it? How do you get to  
22 the composite? I don't understand why the verbal  
23 intelligence index and the nonverbal intelligence index, how  
24 that ends up with a composite intelligence index that's not  
25 an average of the two.



1 MR. SHEA: Well, if I might your Honor, I think  
2 that's a question better posed to Dr. Mart.

3 THE COURT: I will, but I'm just saying, do you  
4 understand how that could end up that way?

5 THE WITNESS: Not precisely beyond I know that it's  
6 not just an average of the two. I mean, there are different  
7 subtests that go into the verbal intelligence index and  
8 different subtests that go into the nonverbal intelligence,  
9 and they both create their indexes independently, and then  
10 the overall battery of tests creates the global composite.  
11 I'm not familiar enough with the Reynolds test to tell you  
12 exactly how that's derived.

13 Q. So the IQ test result that you find invalid, which is  
14 67, 68, and 65, are all within the range of where Dr. Mart  
15 found Mr. Carrington to be in terms of IQ, correct? It's  
16 certainly between the mid-50s and 79, right?

17 A. Well, certainly, yes, because his scores range from 58  
18 to 79, and these scores fall within that range.

19 Q. Right. And those are tests of IQ, right?

20 A. Yes, they are.

21 THE COURT: Have you ever had access to any of this  
22 IQ testing in schools where none of this would be an issue?

23 THE WITNESS: No.

24 MR. SHEA: Well, I can bring us to that.

25 Q. Which is, you were given access, weren't you, at least

1 it's reported in Dr. Preston's -- let me just approach  
2 Mr. Connolly first.

3 Let me show you what I believe to be Boston School  
4 Department records regarding Mr. Carrington, and were you  
5 shown those at any point?

6 A. Yes.

7 Q. Okay. And two of the pages there are his grades from  
8 when he was at Dorchester High School, and one of the more  
9 straight down the page printout is of Mr. Carrington at  
10 middle school and Dorchester High School, correct?

11 A. I believe so.

12 Q. And in that it shows that he was in special education  
13 classes throughout that entire time, doesn't it?

14 A. There appears to be an SPED, which stands for special  
15 education, and I assume it does.

16 Q. Yes, and that starts with him being in which school, if  
17 you can read it off there?

18 A. Well, this starts down in 1978 at Irving Middle School.  
19 Well, no, I'm sorry. Lewenberg Middle School.

20 Q. The Lewenberg Middle School. And you know  
21 Mr. Carrington's date of birth to be 1966, right?

22 A. Yes.

23 Q. So that would roughly place him in the Lewenberg Middle  
24 School at the age of twelve, right?

25 A. Yes.

1 Q. And so he would be, from the age of twelve till the age  
2 he dropped out of high school in the tenth grade, he would be  
3 in special education classes, correct?

4 A. Yes.

5 Q. Now, you have his grades there from his special  
6 education classes in the high school, and what were his  
7 special education grades?

8 A. Well, his grades at Grade 9 were C minuses almost all  
9 the way across the board, although in psychology he made  
10 a C. And then this next one, which is really rather  
11 difficult for me to read, I assume it's the next year  
12 higher, probably tenth grade, and they're predominantly Ds  
13 with one F. However, notice that he was only present seven  
14 out of -- he was only there seven days; he was absent  
15 thirty-four.

16 Q. And that was for special education classes, right?

17 A. Presumably, yes, if this is accurate here, yes.

18 Q. And Mr. Carrington had told you in your subjective  
19 verbal discussions with him that he was in special education  
20 classes, and he was just passed through, right?

21 A. Yes.

22 Q. And the fact that he attended seven out of forty-one  
23 days of class and actually received passing grades in  
24 everything except for wood shop, would that seem to back up  
25 his theory that he did just get passed through the class?

1 A. Certainly.

2 Q. Now, so --

3 THE COURT: So do you have IQ tests that were given  
4 to him in school?

5 MR. SHEA: I don't yet. I mean, we've tried to get  
6 the education records, and it's not easy, but we will go back  
7 and try to get further ones.

8 THE COURT: Was he designated mentally retarded in  
9 school?

10 MR. SHEA: That I can't honestly speak to, your  
11 Honor.

12 Q. Now, I think in the report you mentioned that  
13 Mr. Carrington mentioned being a 766 kid. Do you remember  
14 that?

15 A. Yes.

16 Q. Are you familiar with that, what that means?

17 A. No, beyond his references saying that it has to do, he  
18 was a special education learner.

19 Q. Okay. And special education classes, generally  
20 speaking, are for people of limited intellectual functioning;  
21 isn't that so?

22 A. Actually, I would disagree with that and say "no."  
23 There are individuals in there that are certainly limited  
24 intellectually. It's also designed for any type of special  
25 education requirements for anyone that falls under the

1 Federal Education Act, and that would include mental  
2 retardation. It would include learning disabilities. It  
3 would also potentially include people who have behavioral  
4 problems in the classroom. So we don't know exactly why he  
5 was -- at least I don't know why he was specifically put in  
6 there. It could have been any one of those or multiple of  
7 those.

8 Q. Well, if Chapter 766 was the mainstreaming of mentally  
9 retarded students in the classroom, would that be an insight  
10 as to --

11 THE COURT: No, I -- he doesn't know.

12 MR. SHEA: Okay.

13 THE COURT: I'm not even sure you're right, but he  
14 doesn't know, in any event.

15 Q. Now, you mentioned three test scores as to IQ. Were  
16 there other IQ tests given to Mr. Carrington?

17 A. I don't believe so, but let me double-check on my list  
18 of tests that. . .

19 (Witness examining document.)

20 A. Not that I'm aware of under my direction, no.

21 Q. Okay. And was that one test, or was that three tests?  
22 You gave us three scores.

23 A. It's one test, but it's an IQ battery. So it's like the  
24 Reynolds test. It's made up of smaller subtests that come  
25 together and create composite index scores, nonverbal,

1 verbal, and a global IQ.

2 Q. How many subtests?

3 A. Oh, ten, I believe, off the top of my head, or about  
4 that.

5 Q. And what was the name of it? I'm sorry.

6 A. The Wechsler Adult Intelligence Scale-III.

7 Q. So it's the one listed as number one in the --

8 A. Yes. I'm sorry, there's more than ten.

9 (Witness examining document.)

10 A. Thirteen, there are thirteen subtests in that battery.

11 Q. Okay. Now, so that means out of the sixteen tests given  
12 to Mr. Carrington, one test was an IQ test specifically; is  
13 that right?

14 A. Yes, again, with an IQ battery, yes.

15 Q. Well, I mean, are any others from 2 to 16 IQ tests  
16 specifically?

17 A. No.

18 Q. Okay. Now, Test No. 13, Test of Memory Malinger, the  
19 TOMM test, how did Mr. Carrington do on that?

20 A. He performed well on it. I believe he made two errors  
21 on the first trial and no errors on the second and no errors  
22 on the third.

23 Q. And what is that test meant to test?

24 A. The Test of Memory Malinger is a validity test. It's  
25 designed to detect negative response bias like malingering.

1 Q. And how did he do on it?

2 A. He did well on it.

3 Q. And could you tell us about how that test is performed,  
4 kind of like you went through with the Judge on how the  
5 other --

6 A. Sure. It's a nonverbal test. It's a pictorial test  
7 where a person is shown fifty different line drawings. It's  
8 on a card stock, and they flip over, so you see fifty  
9 different line drawings of simple line drawings.

10 THE COURT: Like a house, the outlines of a house?

11 THE WITNESS: Something like that, or a pen, or an  
12 elephant head or something, very simple basic things that  
13 everybody would recognize, and there are fifty of them. And  
14 so they are told to pay attention and look at each of these,  
15 and we flip them over. And after we present all fifty of  
16 them, then we present all fifty again. And then we ask for  
17 him to -- a similar thing, forced choice, two alternatives,  
18 choose between a picture that was in the list and a picture  
19 that was not, it's a new novel picture. And they look  
20 through that once. Then there is a fifteen-minute delay.  
21 They actually go through it twice, and then there is a  
22 fifteen-minute delay. And then they are not shown the  
23 stimuli again, but then they're asked to recognize the items,  
24 two-alternative forced choice again from memory.

25 THE COURT: How much longer do you think you have?

1 MR. SHEA: Me? I have a little while longer. Do  
2 you want to stop?

3 THE COURT: Do you think you could wrap up this  
4 portion by 5:00?

5 MR. SHEA: I'm not sure. I mean --

6 THE COURT: Understanding that you have to look  
7 through the stuff and will have to come back.

8 MR. SHEA: Yes, I'll probably have to have this  
9 witness back. I can't claim to wrap up this witness because  
10 I haven't even really read his report.

11 THE COURT: I certainly understand that. Can you  
12 finish everything you could do based on what you've done so  
13 far by 5:00?

14 MR. SHEA: Oh, sure. I'm happy to keep going till  
15 5:00 and then stop.

16 Q. That test, can you tell me the date that that test was  
17 given?

18 THE COURT: Which test, the TOMM?

19 MR. SHEA: I'm sorry, the TOMM test, yes.

20 A. Yes, I can. The TOMM was given on November 28.

21 Q. What other tests were given that day?

22 (Witness examining document.)

23 A. The Booklet Category Test, the Tactual Performance Test,  
24 the Sensory Perceptual Examination, the Rey Complex Figure.

25 Q. What number is the Booklet Category Test?



1 A. That's one of the Halstead-Reitan tests.

2 Q. Could you tell me about that one?

3 A. Sure. The Booklet Category Test is a booklet version of  
4 a visual task where -- it's an abstract reasoning and  
5 judgment test where a person is presented with visual  
6 figures, and they have to figure out what number that picture  
7 suggests to them between 1 and 4, and then they choose a  
8 number of 1, 2, 3, or 4, and then they're told whether  
9 they're right or wrong. And their job is to figure out what  
10 the principle is in the pictures, and once they learn that  
11 principle, then they use that principle to get a right answer  
12 each time. And there are seven different subtests in that;  
13 that overall the test is considered a rather difficult test  
14 of complex nonverbal abstract reasoning and judgment.

15 THE COURT: So like what? Give me an example.

16 THE WITNESS: Well, the very first subtest -- the  
17 first two subtests are really very, very easy, and they help  
18 train a person into the process, and I can explain those.  
19 For example, the very first one is very simple. It's got a  
20 picture of the letter I, one big letter I in the middle of  
21 the screen, and what number does that suggest to you? Well,  
22 1. So they would put their finger on 1, and I would say  
23 "correct." Then in the next screen would be two IIs side by  
24 side, ostensibly a Roman Numeral II. Those are very, very  
25 simple. Then it progressively gets more complex. The

1 concepts get more complex dealing with abstract reasoning,  
2 what would be the right answer given this particular image?  
3 It gets complicated, especially without the stimulus.

4 THE COURT: So complicated, one would be a what, a  
5 complex Roman numeral?

6 THE WITNESS: No, no, no. They vary to designs  
7 based on different concepts. They're not just numbers. Some  
8 may be numbers. Some may be figures of people. It kind of  
9 is hard for me to explain in that much detail without the  
10 stimulator to show you. If I had the test here to show you,  
11 I think you would catch on right away, but it's difficult for  
12 me to explain because it's deals with abstract reasoning  
13 based on a nonverbal visual stimulus. It's a very widely  
14 used neuropsychological test to measure executive functioning  
15 skills.

16 Q. And that test showed Mr. Carrington to have difficulty  
17 with abstract reasoning, didn't it?

18 A. Well, the results were very, very poor. As a matter of  
19 fact, this is one of those tests that has embedded indices  
20 within it to give you a heads-up as to whether the person is  
21 actually applying themselves; and his performance on those  
22 suggested, again, that this test result was not a valid  
23 indication of his true effort.

24 Q. Well, you say that, but what I find interesting is, on  
25 that particular day you gave him the TOMM test, which

1 literally has "malingerer" right in its title, and it found  
2 that he wasn't malingering that day, right?

3 A. On that test, yes.

4 Q. Okay. And then you go on to give him this Booklet  
5 Category Test, which is about abstract reasoning and  
6 judgment, and he does very, very poorly, correct?

7 A. Yes.

8 Q. And the thing that had been pointed out by Dr. Mart in  
9 his report was that Mr. Carrington may be aware of concepts,  
10 but that the thing he seemed to have difficulty with was that  
11 very thing, the abstract reasoning part, right?

12 A. Okay.

13 Q. And this very test confirms that; isn't that right?

14 A. Well, but the test results are much worse than one would  
15 expect, given Mr. Carrington's functional abilities. He  
16 scored so poorly on that test to be consistent with someone  
17 who would be, frankly, significantly impaired and in a  
18 nursing home. It's just grossly impaired results that do not  
19 make clinical sense.

20 Q. Well, that's an interesting finding, but at what point  
21 did he do the TOMM test in that day? Do you have a  
22 progression of when these tests were given on that day?

23 A. He would have -- well, I'm not sure exactly which time.  
24 It's listed that same day, so I honestly can't tell you which  
25 tests came first, second, or third. Normally I try to start

1 out -- each of these tests -- I mean, these are tests that  
2 were given over five different sessions, and I try to have  
3 some embedded indices and some freestanding tests that  
4 measure effort in each of these different blocks. And I  
5 usually try to start out with a test somewhat like the TOMM.  
6 So the odds are I would have started with the TOMM and then  
7 later came back with the other tests on the list there.

8 Q. So, I mean, that's your best guess?

9 A. Yes, exactly.

10 Q. But your best guess is, you start out with a test that  
11 shows he's not malingering, right?

12 A. Yes.

13 Q. All right. And --

14 A. Well, on that one result. There's issues with that. I  
15 mean, one can't jump to that conclusion necessarily based on  
16 that one test.

17 Q. Well, I mean, that's why you do the test, right?

18 A. Yes. Each of these tests have got varying levels of  
19 sensitivity, and the research clearly shows, for example,  
20 that the TOMM is not as sensitive of a malingering test as,  
21 say, the WMT or the MSVT even. And just because somebody is  
22 not putting forth their best effort doesn't mean they're  
23 going to do this consistently all the way across the board.  
24 There's variability in it.

25 Q. Well, there's variability in how people test too, isn't

1 there?

2 A. Well, there's a difference between the variability of  
3 their skills, yes, certainly, but there shouldn't be much  
4 variability in their effort. If they start to feel like they  
5 can't do the test very well, they need to stop and say, "I  
6 need a break." And we always encourage them to stop and take  
7 a break if they don't feel like they can do their best.

8 Q. But you categorized some of the tests as what you called  
9 "forced answer." Wasn't that the phrase?

10 A. Forced choice, yes.

11 Q. Forced choice. That means the test forces them to make  
12 a choice, right?

13 A. Yes.

14 Q. Well, that doesn't connote a relaxed atmosphere where  
15 the person can say whatever they wish, does it?

16 A. Well, not -- not -- when you're doing testing, no, it's  
17 not a time to sit and talk about whatever you want to talk  
18 about.

19 Q. Okay, so, I mean, it's not quite as relaxed an  
20 atmosphere, right?

21 A. Correct. No. It's a testing atmosphere.

22 Q. All right. Now, the indices, you say that built into  
23 these booklet category tests are these indices of perhaps the  
24 person not trying their best. That's what you said, right?

25 A. I may have said "built in." If I did, that's somewhat

1 of a miscommunication. They are within it. They weren't put  
2 in there when the test was developed, but through subsequent  
3 research, we have found that if somebody performs certain  
4 ways on these tests, that's really more indicative of  
5 somebody who's not putting forth their best effort than it is  
6 indicative of genuine cognitive difficulties.

7 Q. Okay. But those indices, those are subject to  
8 subjective interpretation, aren't they?

9 A. Well, there's empirical data out there that has specific  
10 cutoffs, and I apply those specific cutoffs. I don't think  
11 that's particularly subjective.

12 Q. But you have to interpret each of the responses, right?

13 A. No. They're either right or wrong.

14 THE COURT: Okay, I think this is probably a good  
15 place to wrap up today because we have to schedule our next  
16 meeting, and the Court Reporter and all of us have had a very  
17 long day. So let's figure out, when can you come back?

18 MR. CONNOLLY: I should tell the Court that I am  
19 away the whole second half of the month of April, so I cannot  
20 be here then. Can I check with the doctors? Are we talking  
21 next week, the week after?

22 THE COURT: I think I'm going to finish this  
23 criminal trial on Tuesday, so I was wondering whether  
24 Wednesday, Thursday, or Friday of next week was within the  
25 range of doable.

1 MR. SHEA: That's when I leave.

2 THE COURT: You're away?

3 MR. SHEA: Yes, Wednesday to the following Monday.

4 THE COURT: Okay. We need basically an afternoon,  
5 if not more, if not two consecutive afternoons. We're on  
6 trial basically forever, so if we finish our trial next week  
7 and then things go -- unless something settles or pleads and  
8 I jump for joy, just in the morning I'm dead for months, so  
9 we need afternoons.

10 (Discussion off the record.)

11 THE COURT: So Friday, at least would that be  
12 doable for you, or is Good Friday a problem for you?

13 THE WITNESS: Is that April 6 you're saying?

14 THE COURT: Yes.

15 THE WITNESS: I believe it's open. I'm sorry, I  
16 don't have my calendar with me.

17 THE COURT: How about the weeks of -- because I  
18 think I'm not going to be -- that whole week, the week of the  
19 17th, 18th, is that when you're gone?

20 MR. CONNOLLY: Yes. I'm gone from the 11th through  
21 the end of the month.

22 THE COURT: Where are you going?

23 MR. CONNOLLY: To Florida.

24 THE COURT: Fun?

25 MR. CONNOLLY: Of course. We coincide it with when

1 my parents rent a house

2 (Discussion off the record.)

3 THE COURT: Right now we'll book the 6th and the  
4 9th. I'll have Robert call e-mail the session and see if we  
5 could put whatever you had with Judge Gertner on another day  
6 or earlier in the day so it didn't cut the day in two.  
7 You're on at what time now?

8 MR. SHEA: I'm on at 2:30 on the 10th, and I can do  
9 the morning if they need me to.

10 THE COURT: That's where I may be iffy, so --

11 MR. CONNOLLY: The 6th and the 9th.

12 THE COURT: We're going to do the 6th and the 9th,  
13 and we're going to check with Judge Gertner's session where  
14 he's otherwise committed. Then we could do the 9th and the  
15 10th so people don't have to worry about Easter.

16 THE WITNESS: Then it would be two afternoons, the  
17 9th and 10th?

18 THE COURT: Yes.

19 THE WITNESS: That would be ideal.

20 (Discussion off the record.)

21 THE COURT: Mr. Connolly, you'll make sure you get  
22 Mr. Shea all the underlying data?

23 MR. CONNOLLY: Sure.

24 THE COURT: And Mr. Shea will get you all the  
25 underlying data so that people can cross based on something



1 other than just the report.

2 MR. SHEA: Yes, that's agreed.

3 THE CLERK: All right, so 2:00 o'clock on the 6th  
4 right now, and we'll go from there.

5 (Adjourned, 5:05 p.m.)  
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C E R T I F I C A T E

UNITED STATES DISTRICT COURT )  
DISTRICT OF MASSACHUSETTS ) ss.  
CITY OF BOSTON )

I, Lee A. Marzilli, Official Court Reporter, do hereby certify that the foregoing transcript, Pages 1 through 73 inclusive, was recorded by me stenographically at the time and place aforesaid in Criminal Action No. 05-10074-PBS, United States of America V. Charles Carrington, and thereafter by me reduced to typewriting and is a true and accurate record of the proceedings.

In witness whereof I have hereunto set my hand this 4th day of June, 2008.

/s/ Lee A. Marzilli

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LEE A. MARZILLI, RPR, CRR  
OFFICIAL COURT REPORTER